STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission,	**:**	
On its Own Motion	**:**	
	:	**07-0483**
Development of Net Metering	**:**	
Standards Required by P.A. 95-0420.	**:**	

ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER

By the Commission:

On August 24, 2007, the Net Metering Statute became law. Section 107.5(h) of this statute requires this Commission to have standards in place regarding net metering within 120 days after this statute's effective date. (220 ILCS 5/16-107.5(h)). The Net Metering Statute also requires electricity providers to offer net metering to the public no later than April 1, 2008. (220 ILCS 5/16-107.5(i)).

Accordingly, on December 19, 2007, this Commission issued an Order authorizing the submission of an emergency rule regarding net metering to the Illinois Secretary of State. That Order also authorized the submission to the Secretary of State of the First Notice of the proposed Rule, Part 465, thus commencing the First Notice Period for Part 465 pursuant to Section 5-40(b) of the Administrative Procedure Act.

The proposed Rule was published in the *Illinois Register* on January 4, 2008, initiating the first notice period pursuant to Section 5-40(b) of the Illinois Administrative Procedure Act. With the end of the statutorily-mandated first notice period, this Commission can now submit the second notice of the proposed rule to the Joint Committee on Administrative Rules.

In general, net metering is used when electric customers that generate power wish to interconnect with their electric suppliers and sell the power that these customers generate to their electric suppliers.[1] A net meter measures the flow of electricity in both directions; it keeps track of the electricity that customers sell to their electric suppliers, as

[1] Docket 06-0525 concerns developing standards for this type of interconnection.

well as that which they receive. The General Assembly has required both electric utilities and the alternative retail electric suppliers (the "ARES") to offer net metering to the public. (220 ILCS 5/16-107.5(b)).

Participating in this docket were: the Commonwealth Edison Company; ("ComEd") MidAmerican Energy Company; ("MidAmerican") the Ameren Illinois Companies; ("Ameren") the Illinois Attorney General; (the "AG") the Environmental Law and Policy Center; (the "ELPC") Commission Staff; Constellation New Energy, Inc. ("Constellation") and the Retail Energy Suppliers Association ("RESA"). These entities filed Comments on January 17, 2008, and Reply Comments on January 23, 2008.

As many of these Comments indicate, Staff has conducted extensive workshops with the parties. As a result, many of the changes to the Rule were reached by consensus, leaving few substantive issues. For the most part, the parties refined the language in the Rule and added certain language to clarify it. The substantive changes recommended by the parties are set for the below.

465.40 Net Application and Enrollment Procedures

465.40(d) Open Enrollment During the First Year of Net Metering

The General Assembly has required the electric utilities to conduct a net metering "trial run" during the first year of statutorily-required net metering by limiting the amount of eligible customers that have nameplate ratings of 40 kilowatts and below to 200 new billing accounts for the period from April 1, 2008 through March 31, 2009. (220 ILCS 5/16-107.5(j)). Therefore, the Rule created an enrollment period and queue priority for this first year of net metering. (Section 465.40(c)).

The AG recommended adding a sentence to Section 465.40(d) to ensure that customers who applied during the one-month open enrollment period described in Section 465.40(c) would be placed first in the queue that is established immediately after the open enrollment period. (AG Comments at 2). Staff agreed with the AG and added the AG's recommended language to the revised Rule. (*See,* Staff Reply Comments at 3). No party objected to this language.

465.40(i) (Now (j)) Clearing "Dead" Applications

The Net Metering Statute provides that, after March 31, 2009, an electricity provider (an electric utility or an ARES) "shall provide net metering" to eligible customers until the provider's load of net metering customers equals 1% of that provider's peak demand, as determined by its previous year's load. (220 ILCS 5/16-107.5(j)). This statute also provides that electricity providers may offer net metering beyond that point. However, the electricity providers are not required to offer net metering beyond this point. (*Id.*). Thus, Section 465.40 established enrollment procedures and queue priority for applicants who wish to net meter.

Section 465.40(j) provides that when establishing enrollment limits, an electricity provider may cancel a customer's authorization to net meter, if, 12 months after receiving authorization to net meter, that customer has not executed an interconnection agreement. The ELPC supports inclusion of this language, as it clears "dead" applications from occupying space under the net metering cap mentioned above. However, the ELPC argues that language should be added to ensure that customers that are attempting to diligently move forward are not unnecessarily "thwarted" by the interconnection process. The ELPC points out that customers cannot execute an interconnection agreement until a utility's interconnection review is complete. In some cases, it asserts, this review process may take several months to complete. (ELPC Comments at 2). The ELPC contends that the following language should be added to this portion of the Rule: "All deadlines under this subsection shall toll during the period while the eligible customer's interconnection application is under review by the customer's electric utility." (*Id.*).

Staff maintains that the situation described by the ELPC should not arise. It, therefore, does not recommend adoption of the ELPC's suggested language. (Staff Reply Comments at 8).

MidAmerican contends that there is no provision in the Rule that requires net metering customers to submit interconnection applications when qualifying for net metering. Thus, delay on the part of a customer could limit the amount of net metering activity by depriving lower-queued customers of the opportunity to net meter. It avers that, if this Commission adds the language ELPC seeks to include, it should also add the following language as a new Subsection 465.40(g).

> A customer authorized to net meter under Subsection (f) shall submit an executed application for interconnection to the electric utility within 30 business days of the date of notification from the utility that is authorized to participate in the electricity provider's net metering program.

(MidAmerican Reply Comments at 1-2).

Analysis and Conclusions

Subsection (j) of the Net Metering Statute provides that:

> > An electricity provider shall provide net metering to eligible customers until the load of its net metering customers equals 1% of the total peak demand supplied by that electricity provider during

> the previous year. Electricity providers are authorized to offer net metering beyond the 1% level if they so choose.

(220 ILCS 5/16-107.5(j)). Thus, it appears that, an unnecessary delay on the part of an electricity supplier, or, on the part of a customer, could unreasonably limit the amount of net metering activity by depriving lower-queued customers of the opportunity to net meter. Also, adding the language proffered by MidAmerican adds clarity to the Rule as a whole, as a net meter is only useful when a customer is interconnected. We conclude, therefore, that the language suggested by the ELPC, as well as that proffered by MidAmerican, should be included in the rule.

465.40 (i) and (k) Notification Between the Utilities and the ARES

ComEd proposed to add language to 465.40 to require notification between an ARES and an electric utility whenever a customer chooses to net meter or cancels net metering. No party objected to this language. (ComEd Comments, Attachment, at 4).

Staff found that adding this language is reasonable, as electric providers have a legitimate interest in keeping track of the number of net metering customers that are on their systems. (Staff Reply Comments at 2). This language was added to the Rule.

465.50 Electricity Provider Billing for Eligible Customers

Credits for ARES Customers

ComEd recommends adding language to this portion of the Rule clarifying that, when a net metering customer that is served by an ARES that has generating facilities under 40 kW, earns a credit for sales of excess kilowatt-hours to its electricity provider, that customer will be given a delivery-based credit from the electric utility. (ComEd Comments, Attachments at 6).

Staff found this recommendation to be reasonable. No party objected to it. This language was added. (Staff Reply Comments at 2).

465.50(a) "True" Net Metering for Customers with Generators at 40 kW and Below

The ELPC argues that "true" net metering replicates the concept of a single meter spinning forward and backward. In such a situation, it avers, the charges in addition to those for electricity generated would be based upon the "net" amount of power either purchased or sold by the customer, as measured by the final position of the meter at the end of a billing period. According to the ELPC, the Net Metering Statute was designed to create a "true" net metering system for customers with generators that are 40 kW and below, and a "dual" system for larger facilities. In support, it cites 220 ILCS 5/16-107(e) and 16-107.5(f)(1). It asserts that the General Assembly intended to permit customers with generators that have nameplate ratings of 40 kW or below to incur no taxes, fees, or delivery charges, except for on any electricity that did not "net out." According to the ELPC, statutorily, this group of customers is only liable for the taxes, fees, delivery charges, and other charges when the electricity that is used by those customers is in excess of what those customers sell to their electric providers. And, in such a situation, these charges would be based solely upon this excess electricity. (*See,* ELPC Comments at 3-4).

It maintains that the Net Metering Statute accomplishes this goal, except when a utility assigns delivery charges on a "peak demand" basis, as opposed to on a per kWh basis. In such a situation, it avers, a customer may be assigned a distribution facilities charge, even though that customer's net consumption of power is zero. (*Id.* at 4). The ELPC proffered language to add to Section 465.50(a), set forth below, to correct this situation.

> If an electric provider's tariff includes a demand charge, a demand charge billing credit shall also be provided that reduces the demand charge in the same proportion as the total energy charge is reduced by the customer's net metered generation, such that if the customer-generator's energy charge is reduced to zero in any particular month, the demand charge would also be reduced to zero.

(*Id.*).

ComEd points to the Net Metering Statute, which only allows kilowatt-hour credits for the electricity produced by a net metering customer. (ComEd Reply Comments at 1; 220 ILCS 5/16-107.5(d)(2)). It contends that this statute specifically requires electricity providers to provide net metering customers with "electric service at non-discriminatory rates that are identical, with respect to rate structure, retail rate components, and any monthly charges, to the rates that the customer would be charged if not a net metering customer." (220 ILCS 5/16-107.5(d)). ComEd further asserts that Subsection (e) of the statute requires that a customer "will remain responsible for all taxes, fees, and utility delivery charges that would otherwise be applicable to the net amount of electricity used by the customer." (ComEd Reply Comments at 1-2; 220 ILCS 5/16-107.5(e)).

According to ComEd, the sections of the Net Metering Statute cited above necessarily require that a net metering customer/supplier's benefits are only in the form of kilowatt hour credits resulting from that customer's generation of electricity. ComEd avers that the General Assembly did not intend to reduce any other charges that a net metering customer/supplier incurs. (ComEd Reply Comments at 1-2).

MidAmerican's tariffs require payment for monthly services, any minimum demands, taxes and franchise fees. It asserts that net metering does not relieve a utility of those expenses. MidAmerican, also, cites Section (e) of the Net Metering Statute. MidAmerican argues that it would be discriminatory, and in conflict with Subsection (e), for a net metering customer/supplier to be relieved of its obligations to pay those charges. (MidAmerican Reply Comments at 2-3; 220 ILCS 5/16-107.5(e)).

MidAmerican further avers that distributed generation is a variable resource. A demand charge covers the cost a utility incurs in maintaining sufficient electrical facilities at all times to meet each customer's highest demand for energy during a billing period. It posits that the maximum kWh produced and the maximum experienced kilowatt demand are not precisely related. Even though a customer may produce more energy in a month than it uses, that customer may still impose a higher electrical demand on the host utility system. According to MidAmerican, reducing demand by the same proportion of the customer's energy charge would be over-compensating that customer. (MidAmerican Reply Comments at 4-5).

Ameren maintains that, if the General Assembly intended to implement a special demand charge calculation, as the ELPC argues, it would have so specified in the Net Metering Statute. A demand charge, according to Ameren, is a billing mechanism that relies on a customer's maximum usage during a billing period. It is intended to hold larger non-residential customers responsible for the peak demand requirements that they place on the system during the billing period. It further asserts that most of the customers that operate a generating unit with a capacity rating at or below 40 kW are not likely to be within a rate classification that even has a demand-based charge. It is atypical, Ameren reasons, to have a relatively large industrial or commercial customer interconnect such a small-sized generator. (Ameren Reply Comments at 2-4).

Staff additionally maintains that the Net Metering Statute requires customers with generators under 40 kW to receive a 1:1 kilowatthour credit. (Staff Reply Comments at 10; 220 ILCS 5/16-107.5(d)(2)).

Analysis and Conclusions

The ELPC offers no factual support for its conclusion that "true" net metering allows a customer/supplier to "net out" charges beyond receiving credit for the electricity supplied in the form of kilowatthour credits. Moreover, as ComEd, MidAmerican and Staff point out, the ELPC is not correct when arguing that the Net Metering Statute requires electricity suppliers to bill taxes, demand charges, and other charges to this group of customers solely upon the electricity that is not "netted out." The ELPC's contention ignores Section (e) of the Net Metering Statute, which provides that customers remain responsible for "all taxes, fees, and utility delivery charges that would otherwise be applicable to the net amount of electricity used by the customer." (220 ILCS 5/16-107.5(e)). It also ignores Section (d)(2) of this statute, which requires that a customer receives a "1:1 *kilowatt-hour* credit" to a subsequent bill. (220 ILCS 5/16-107.5(d)(2); emphasis added). Therefore, this group of net metering customer/suppliers is only entitled to kilowatt-hour credits. They remain liable for all other charges, and they are liable for charges based on all of the electricity they receive, irrespective of what electricity they generate.

Further, Section (e) of the Net Metering Statute also requires electricity providers to provide net metering customers with "electric service at non-discriminatory rates" that are "identical, with respect to rate structure, retail rate components and any monthly charges to the rates that the customer would be charge if not a net metering customer." (220 ILCS 5/16-107.5(e)). If the net metering customer/suppliers at issue were allowed to receive credits other than those for the kilowatt-hours of electricity they supplied to their electricity providers, they would be receiving electricity at a rate that is different from how customers without net meters are billed, as other customers are liable for, and pay for, base rates, taxes and like items on all of the electricity they receive from their electricity suppliers.

We also note that other provisions of the Public Utilities Act prohibit the granting of preferences or advantages or unreasonable differences as to rates or other charges. (220 ILCS 5/9-241). Section 9-241 of the Act and Section (e) of the Net Metering Statute embody the simple, but crucially important, notion that customers must be treated fairly. Fairness excludes the ELPC's contention that certain net metering customers are not liable for taxes, demand charges, base rates and like items, when other customers are liable for these charges.

Section 465.50(b)(1)(i) Billing for Non-Residential Customers with Generators Over 40 kW that Take Service Under Rates Other than Time of Use Rates.

Section 465.50(b)(1)(i) provides that, for customers with generators over 40 kW that do not take service under a time of use rate, in any month in which a customer/supplier is a net seller of electricity, an electricity supplier shall compensate a customer at the electricity supplier's avoided cost of electricity, multiplied by the net amount of electricity sold to the electricity supplier. When a customer/supplier is a net purchaser, the electricity provider must charge customer/supplier the tariffed or contractual rate.

The AG and the ELPC proffered language intended to clarify that the avoided cost rate mentioned in the Rule applies only to excess kilowatt-hour credits that a generating customer receives in any given month, but not to any electricity that is "netted out." The ELPC provides an example whereby if a facility receives 100 units of power from the grid and supplies 120 units to the grid in any given month, the first 100 units would "net out" and the customer/supplier would received an avoided cost rate for the excess 20 units. (ELPC Comments at 4; AG Comments at 2-3). The ELPC asserts that charging at the tariffed rate and compensating at the avoided cost rate is not true "net metering." (ELPC Reply Comments at 2).

Staff, however, avers that this recommendation is not workable for the utilities that have tariffs, in which, there are multiple costs that are avoided. It is not clear, Staff continues, which avoided cost should be applied to the excess kilowatt-hours generated. Staff contends that adoption of the language proffered by these entities would, in all likelihood, create new problems, such as unnecessary changes to existing tariffs. (Staff Comments at 3-4).

ComEd maintains that it has two tariffed avoided cost rate structures. Because there is no way to determine when (what time of day) a net metering customer's generation takes place, ComEd cannot determine, with certainty, what cost is avoided. ComEd's solution to this dilemma is to compensate a net metering customer for all generation put onto the grid at rates approximate to the times that the customer's generation took place. It asserts that this generation is excess, meaning that it is only introduced onto the grid if it exceeds a customer's usage at any point in time. (ComEd Reply Comments at 2-3).

Analysis and Conclusions

We decline to adopt the language offered by the AG and the language offered by the ELPC. This language creates unnecessary confusion and it does not address the situation described by ComEd, where it is not possible to determine what cost is avoided. Moreover, the ELPC offers no evidence establishing that "true" net metering requires electricity providers to bill in the manner it describes.

Section 465.50(b)(1)(i) Billing for Non-Residential Customers with Generators Over 40 kW that Take Service Under Time of Use Rates

MidAmerican proposes to add language to Section 465.50(b)(2)(i) stating that compensation due to time-of-use customers who are net sellers is at "avoided cost." (MidAmerican Comments at 4).

Staff recommends excluding the language proposed by MidAmerican. Staff maintains that what is due such a customer depends on the type of retail rate, under which, that customer takes service. Some time-of-use customers pay rates that vary hourly; others pay rates that vary less frequently. In neither case would the compensation to a time of use customer be valued at "avoided cost." Staff points out that the Rule uses the term “applicable rate” which includes both types of situations that were just previously mentioned, as well as other types of situations. (Staff Reply Comments at 14-15).

Constellation contends that, for time of use customers, there is no set “avoided cost rate” for either the utilities or the ARES. Constellation further asserts that the language proposed by MidAmerican could create confusion. (Constellation Reply Comments at 5).

Analysis and Conclusions

We decline to add the language proposed by MidAmerican. As Constellation and Staff point out, for time of use customers, there is no set “avoided cost rate.” Including MidAmerican’s language, at best, would only cause confusion.

Section 564.60 Reporting Requirements

Requiring Electricity Providers to Report the Results of “Considering” Meter Aggregation.

The ELPC looked to the Net Metering Statute, which provides that:

> [E]ach electricity provider shall consider whether to allow meter aggregation for the purposes of net metering on:
>
> > (1) properties owned or leased by multiple customers that contribute to the operation of an eligible renewable electrical generating facility, such as a community-owned wind project or a community methane digester processing livestock waste from multiple sources; and
> >
> > (2) individual units, apartments, or properties owned or leased by multiple customers and collectively served by a common eligible generating facility, such as an apartment building served by photovoltaic panels on the roof.
>
> For the purposes of this subsection (l), “meter aggregation” means the combination of reading and billing on a pro rata basis for the types of eligible customers described in this Section.

(220 ILCS 5/16-107.5(l)). It asserts that Section 465.60 of the Rule, which concerns reporting requirements, should be modified to include the results of the consideration described in the statutory language cited above. According to the ELPC, without any reporting mechanism, the General Assembly’s goal of “learning something about whether this policy option is feasible” will go unfulfilled. (ELPC Comments at 5).

The AG supports the ELPC's proposed reporting requirement. The AG argues that meter aggregation will help to promote renewable energy resource investments by communities and on properties owned or leased by multiple parties, such as apartment buildings. It proffered additional language requiring electricity providers to demonstrate, by a date certain, that they have given due consideration to the feasibility of meter aggregation. (AG Reply Comments at 4).

ComEd avers that the statute does not call for such reports. It also states that the need for such a report is not apparent at this time. It concludes that the ELPC's proposal should therefore be rejected. (ComEd Comments at 3-4).

Staff contends that Section 107(l) of the Net Metering Statute requires electricity providers to "consider" meter aggregation. It does not require electricity providers to report whether they have considered meter aggregation. (Staff Reply Comments at 10-11).

Constellation avers that this suggested requirement exceeds the reporting requirements in the statute. (Constellation Reply Comments at 6, citing 220 ILCS 5/16-107.5(k)).

Ameren maintains that it has considered the aggregation of net metering generation. Ameren concludes, however, that at this time, such aggregation should not be implemented. It further contends that meter aggregation for load customers can be a controversial issue in rate proceedings due to the inevitable shifting of costs to other non-aggregating customers. Ameren believes that aggregation of metered generation by net metering customers is an issue that should be addressed in a rate proceeding, where the parties that are affected by this topic have notice and an opportunity to voice their concerns. (Ameren Reply Comments at 6-7).

Analysis and Conclusions

The statutory language cited above does not speak of the General Assembly's need to learn about the electricity providers' decisions regarding meter aggregation. It merely requires electricity providers to *consider* whether to allow meter aggregation for the purpose of net metering. (220 ILCS 5/16-107.5(l)). Therefore, the statute does not require electricity providers to report to this Commission their decisions when considering meter aggregation.

Section 465.90 Miscellaneous

ARES Early Termination Charges

The AG, in its Initial Comments, proposed adding language to Section 465.90(a) to protect customers "faced with a Hobson's choice," which is, according to the AG, when a customer pays a switching fee to obtain the net metering terms that utilities are required to offer, versus staying with an ARES that offers less favorable terms for net metering. (AG Initial Comments at 3). To prevent this situation, the AG proposes to change Section 465.90(a) as indicated by the additional language in bold below:

> (a) In accordance with Section 16-107.5(e) and (f) of the Act, nothing in this Part is intended to prevent an arms-length agreement between an electricity provider and an eligible customer that either (i) that sets forth different prices, terms, and conditions, for the provision of net metering service, including, but not limited to the provision of the appropriate metering equipment for nonresidential customers, or (ii) set forth the ownership or title of renewable energy credits. In accordance with Section 16-107.5(m) of the Act, nothing in this Part is intended to affect existing retail contracts between an alternative retail electric supplier and an eligible customer. **However, in cases where an existing retail contract requires an eligible customer to pay a fee to terminate service with the retail electric supplier, the alternative retail electric supplier must offer net metering service to that customer on terms that meet at least the minimum requirements set forth in Section 465.50 of this Part.**

(AG Initial Comments at 4).

The AG further states that, without this additional language, ARES customers do not have meaningful choices, as, an ARES could "exploit its unequal bargaining power" and provide less favorable terms to a customer than that which a utility provides. It contends that the current language could place a net metering customer in an unconscionable situation because such a situation would not provide a customer with a meaningful choice. (*Id.* citing *Hartford Fire Insurance v. Architectural Management, Inc*, 194 Ill. App.3d 110, 116, 550 N.E.2d 1110 (1st Dist. 1990)).

RESA asserts that the AG's argument would allow a customer to break the terms in its contract with an ARES and obtain service from another provider in the event that a customer and the ARES were unable to reach an agreement as to the terms and conditions for net metering service. RESA further maintains that Section 16-107.5(m) of the Net Metering Statute explicitly provides that: "Either the electricity provider or the customer may require compliance with the prices, terms, and conditions of the contract." It maintains that the AG's language improperly allows a customer to circumvent the language in the statute. (220 ILCS 5/16-107.5(m); RESA Reply Comments at 3). RESA also argues that merely failing to mirror a utility's terms hardly rises to the level of unconscionable conduct. (RESA Reply Comments at 2).

According to Constellation, there is no nexus between an ARES' termination fees and the billing process. It, too, asserts that the AG's argument ignores the language in Section 16-107.5(m) of the Public Utilities Act. (Constellation Reply Comments at 3).

Staff argues that AG only partially quoted the holding in *Hartford.* According to Staff, the AG presumes, without any evidence, that there is an absence of a meaningful choice and therefore, unreasonable terms in the ARES' contracts. (Staff Reply Comments at 7). Additionally, according to Staff, the AG's presumption is both inconsistent with the applicable case law and with Sections 5/16-115A(c) and 5/16-119 of the PUA, which expressly provide for early termination fees in an arms-length contract between an ARES and its customer. (*Id.).*

Analysis and Conclusions

The AG's argument only partially presents the definition of unconscionability. The term "unconscionable" encompasses the absence of meaningful choice by one of the parties to a contract, as well as contract terms that are unreasonably favorable to the other party. (*See, e.g., First Financial Ins. Co. v. Purolator Security Inc.,* 69 Ill. App. 3d 413, 419, 388 N.E.2d 17 (1st Dist. 1979)). The presence of a meaningful choice is considered based on the following factors: (1) all the circumstances surrounding the transaction, including the manner, in which, the contract was entered into; (2) whether each party had a reasonable opportunity to understand the terms of the contract; and (3) whether important terms were hidden in a maze of fine print. (*Frank's Maintenance & Engineering, Inc. v. C.A. Roberts Co.,* 86 Ill. App. 3d 980, 989-90, 408 N.E.2d 403 (1st Dist. 1980)). Additionally, while the presence of a party's limited bargaining power may affect a trier of fact's interpretation of contractual provisions, the relative bargaining power of a party to a contract is but one factor to be considered. (*First Financial,* 69 Ill. App. 3d at 419).

Here, the AG stated no facts indicating that there actually is an unequal bargaining power between an ARES and a customer. At most, the AG assumes the mere presence of a possible unequal bargaining power between a customer and an ARES. The AG also does not mention any of the other factors that are necessary to establish unconscionability.

Further, *Hartford* does not support the AG's unconscionability argument. In *Hartford*, the court concluded that a liquidated damages provision in a contract between a school district and a fire alarm installer that limited the fire alarm company's damages to $90.00, despite the fact that a fire occurred in the school, was not unconscionable. (*Hartford,* 194 Ill. App. 3d at 116). The *Hartford* court concluded:

> Despite any disparity in bargaining power between the defendant and plaintiffs' subrogor in the instant case, we do not believe that the contract

> can be characterized as unconscionable. The liquidated damage provision was clear and explicit and limited defendant's liability to six times the monthly fee.

(Id.). Therefore, the AG did not establish that an early termination clause in an ARES contract is unconscionable. Moreover, as Staff points out, these clauses are explicitly permitted and recognized by the Public Utilities Act.

Finally, it appears that this language would only apply to ARES customers who net meter. The AG did not explain why net metering customers should be allowed to ignore a contractual obligation while other ARES customers, presumably, would still be required to pay an early termination fee. We decline to incorporate the language proffered by the AG into the Rule.

Section 465.90(b) ARES Licensing

Constellation proposed adding language to Section 465.90(b) to address the fact that ARES licenses often include limitations upon the scope of the authority of an ARES to serve certain classes of customers. It is the bolded language below:

> Nothing in this rule shall be construed to impose upon alternative retain electric suppliers additional obligations that they do not otherwise have under the Public Utilities Act to serve customers. **Nor shall anything in this rule be construed to impose an obligation upon alternative retail electric suppliers to serve customers or customer classes that exceeds that authority contained in the certification granted by the Commission to the alternative retail electric supplier.**

(Constellation Comments at 2). RESA maintains that these restrictions should be acknowledged in the Rule. (RESA Reply Comments at 3).

Staff, however, recommends excluding Constellation's proposed language. Staff maintains that Section 16-115 of the Public Utilities Act, as well as the Net Metering Statute, impose obligations on ARES. Including this language, Staff reasons, could "muddy" the ARES' obligations pursuant to the Public Utilities Act, or, even undermine some of those obligations. (Staff Reply Comments at 16).

Analysis and Conclusions

We agree with Staff. This Commission cannot promulgate a rule that expands upon or contravenes the Public Utilities Act. Therefore, this language adds nothing of substance. Moreover, Staff's contention is well-founded. This language could create confusion, unnecessarily.

Finding and Ordering Paragraphs:

The Commission, having considered the entire record and being fully advised in the premises, is of the opinion and funds that:

(1) the Commission has subject-matter jurisdiction and jurisdiction over the parties;

(2) the recitals of fact set forth in the prefatory portion of this order are supported by the record and are hereby adopted as findings of fact;

(3) the proposed Rule, 83 Ill. Adm. Code 465, as reflected in the attached Appendix, should be submitted to the Joint Committee on Administrative Rules to begin the second notice period.

IT IS THEREFORE ORDERED that the proposed Rule, 83 Ill. Adm. Code 465, as reflected in the attached Appendix, is submitted to the Joint Committee on Administrative Rules, pursuant to Section 5-40(c) of the Illinois Administrative Procedure Act.

IT IS FURTHER ORDERED that this Order is not final; it is not subject to the Administrative Review Law.

By Order of the Commission this 12th day of March, 2008.

Claudia E. Sainsot

Administrative Law Judge

Illinois Commerce Commission

Briefs on Exception to be filed and served on February 26, 2008.